

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

2. The incident in question occurred on September 13, 2007 and involved petitioner's thirteen-year-old son, S.C. As will be more fully described below, the petitioner and S.C. became involved in an argument in which petitioner

slapped S.L.'s face twice with an open hand. Petitioner has been forthcoming from the date of the incident that she slapped S.C. twice.

3. The petitioner's childhood was marked by emotional, physical and sexual abuse. Petitioner was sixteen years old when she met her husband and she married him when she was eighteen years old. Petitioner described an abusive relationship compounded by the husband's religious beliefs that wives are subservient to husbands. Petitioner described how her husband has inculcated the older children with his beliefs including derision of her. Petitioner removed herself from her husband's abuse during April 2006.

4. S.M. is an investigative social worker with the Department. S.M. testified that she was aware that there was a long history of domestic violence in the form of power and control by the husband over petitioner and the older children. S.M. used the word "brainwashing" to describe how the husband taught the older children to treat the petitioner.

5. At the time of the incident, the petitioner and her husband were subject to a Family Court order that placed the minor children with petitioner during the work week and

placed the minor children with the husband during the weekends.

6. On September 13, 2007, S.C. and his two younger siblings were in petitioner's custody. Petitioner needed to run errands; S.C. requested that he visit his father at work, a pizza parlor, while petitioner ran her errands. Petitioner agreed and allowed S.C. to stay with his father during her errands.

When petitioner returned to pick up S.C. he did not want to return with her. Petitioner and S.C. argued but he did return with her. S.C. continued to argue during the ride to petitioner's home.

Petitioner described S.C.'s words as a trigger because they were disrespectful and similar to how her husband and older children spoke to her. She testified that she had a hard time dealing with another child repeating words and attitudes that she found emotionally abusive. Petitioner was under a great deal of stress including financial and emotional stress. She saw her position as a parent disintegrating.

After arriving home, petitioner testified that she felt that both she and S.C. were having a hard time and needed space. Petitioner told S.C. to go to his room. S.C.

continued to argue with her. Petitioner slapped S.C. on the face. S.C. continued arguing. Petitioner slapped S.C. a second time on his face with more force. Petitioner testified that she cried and told S.C. she was sorry. Petitioner testified that she wanted to get S.C.'s attention and that she was frustrated. She testified that slapping creates a sting.

7. S.C. told petitioner that he wanted to phone his father. The petitioner placed a telephone call to her husband. Petitioner and S.C. spoke by speaker phone and told the husband about the slaps. Later that evening, the police came to petitioner's home; petitioner's husband had telephoned the police. The police officer spoke to both petitioner and S.C.¹ Petitioner told the police officer about the slaps. No criminal charges were filed.

8. W.W-S. is a licensed school counselor at the school SC and his two younger sisters attend. On September 14, 2007, she was notified by the administrative office that petitioner had telephoned the school to inform them she could not provide transportation for a field trip because she was

¹ S.C. returned to his father that evening and his sisters returned to their father the next day. The children remained in the father's custody. Provisions are now being made through the divorce action to transition to each parent having the children with her/him fifty percent of the time. The children have a guardian ad litem in the divorce case. In addition, petitioner is now in counseling.

upset. W.W-S. testified that she telephoned the petitioner. W.W-S. described the petitioner as sounding upset and saying she wanted help. Petitioner told W.W-S. that she had lost it the previous evening and slapped S.C. twice. W.W-S. gave petitioner information regarding resources; she agreed that petitioner should not provide transportation for the field trip.

9. S.L. is a fifth and sixth grade teacher; he teaches S.C. On the morning of September 14, 2007, S.L. saw S.C. enter the classroom and noticed a mark on S.C.'s face. He testified that the mark looked like a rash. He asked S.C. what happened and was told that petitioner lost it and slapped S.C. S.L. followed school protocols and notified W.W-S.

10. W.W-S. interviewed S.C. and his two sisters that same day. S.C.'s information was consistent with the petitioner's report as well as his younger sister's reports. W.W-S. testified that S.C. told her he wanted to stay with his father and that he gave the petitioner a hard time. She testified that S.C. stated the first slap did not hurt much but the second slap made him see stars and start to fall back. W.W-S. described S.C.'s left cheek as reddish but that

it had not turned into a bruise. As a mandatory reporter, W.W-S. made an abuse report to the Department that same day.

11. Evidence was not presented whether the reddish mark turned into a bruise or whether any marks were apparent after September 14, 2007.

12. On September 14, 2007, the Department assigned the case to S.M. S.M. ordinarily meets with a child immediately after receiving a case. S.M. was unable to meet S.C. until approximately one week later because S.C. was at a weeklong school outing. S.C. told S.M. that he did not want to return to the petitioner's home from his father's worksite on September 13, 2007. He confirmed that he and the petitioner argued and that he was somewhat disrespectful. He confirmed being slapped twice.

S.M. testified that the slaps were open-handed and that S.C. stated that the slaps did not really hurt. S.M. testified that the September 13, 2007 police officer's report noted that the police officer did not see redness or swelling on S.C.'s face but that it was dark. S.M. did not indicate that she saw any bruising.

ORDER

The Department's decision to substantiate abuse is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the administrative review results in a decision upholding the substantiation, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse, harm, and physical injury as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . .

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment;

. . .

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

Petitioner argues that the Department has not sustained their burden of proof because the slaps, in and of themselves, do not rise to the level of temporary disfigurement necessary to show physical abuse.

Prior Board decisions have addressed what constitutes temporary disfigurement. Each case has been decided after scrutinizing specific facts and context. A review of these cases is instructive.

The Board has affirmed the Department in situations where the bruising has lasted at least for one week or in situations where the bruising is in conjunction with a history of inappropriate hitting. See Fair Hearing No. 13,796 (The daycare worker, pediatrician, and department investigator observed bruises. These bruises were apparent more than one week from the incident. Although the abuse was an isolated incident during the emotional distress of a divorce, the existence of bruising one week after the incident showed that the child was hit with sufficient severity to uphold an abuse substantiation.), Fair Hearing

No. 10,543 (Day care provider bit child with bruising evident more than one week from incident. Bruising constituted temporary disfigurement.), Fair Hearing No. 10,419 (evidence of bruise in conjunction with history of excessive spanking), and Fair Hearing No. 11,444 (bruises and welts caused by hitting child with belt and other objects).

The Board has reversed the Department in other cases in which the particular situation did not rise to the level of harm contemplated in the statute. See Fair Hearing 10,687 (the definition of "harm" encompasses a wide range of events but does not require a finding of abuse in each and every case. The Board emphasized that the situation, as a whole, needed to be looked at. Although the parents used spanking for discipline for a short period of time and the child had a bruise from spanking, the parents were caring parents who normally did not use spanking for discipline, would not do so in the future, and the child was not believed at risk of harm.), Fair Hearing No. 19,112 (petitioner grabbed child by hair and bumped child's head against wall during crisis situation at a residential care facility. Abuse was not found.), and Fair Hearing No. 21,194 (Child sustained scratches when father was trying to restrain child who was physically acting out.).

There is no dispute that petitioner slapped S.C. twice. Her response to S.C. on September 13, 2007 was unfortunate and ill-considered. However, the dispute is whether the slaps rise to the level of physical abuse.

There is no dispute that the petitioner is extricating herself from an abusive relationship that has included a bitter divorce and custody dispute. Her actions should be looked at, in part, as arising from her situation. In addition, petitioner now finds herself in a situation where the custody issues are reaching resolution and in a situation where she has availed herself of counseling. The Family Court continues jurisdiction over this family including consideration of the best interests of the children.

The testimony includes (1) a reference to a police report in which the police officer did not note redness or swelling on September 13, 2007, (2) S.C.'s teacher testifying that S.C.'s left cheek looked like a reddish rash on September 14, 2007, (3) the school counselor's testimony that S.C.'s left cheek was red on September 14, 2007, and (4) varying remarks by S.C. to others whether the slaps hurt. There is no testimony that the reddish marks turned into a bruise or that these marks lasted a week or more.

The evidence is insufficient to show that petitioner's acts caused temporary disfigurement within the meaning of 33 V.S.A. § 4912(6). Accordingly, the Department's decision to substantiate abuse is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule 17.

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